Transportation Act (49 U.S.C. 1655(c)); and 14 CFR 11.49(b)(3))

Note.—The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034: February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. The FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Issued in Washington, D.C. on June 4, 1982.

Note.—The incorporation by reference in the preceding document was approved by the Director of the Federal Register on December 31, 1980.

John M. Howard,

Acting Chief, Aircraft Programs Division.

[FR Doc. 82-15932 Filed 6-11-82; 8:45 am]

BILLING CODE 4910-13-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1025

Equal Access to Justice Act Regulation

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: In this document the Consumer Product Safety Commission issues its final regulation implementing the Equal Access to Justice Act (EAJA) which took effect October 1, 1981. The purpose of the EAJA and the Commission's regulation is to provide for the award of fees and expenses to eligible parties who prevail over the Commission in certain adversary adjudicative proceedings unless the position of the Commission is substantially justified. An additional purpose of the EAJA and the Commission's regulation is to establish uniform procedures for making awards of fees and expenses.

EFFECTIVE DATE: June 14, 1982.

FOR FURTHER INFORMATION CONTACT: Eric N. Wise or Alan H. Schoem, Office of the General Counsel, Consumer Product Safety Commission, Washington, D.C. 20207, phone: (301) 492-6980.

SUPPLEMENTARY INFORMATION: The Equal Access to Justice Act (hereinafter, the "EAJA"), Pub. L. No. 96-481, 94 Stat. 2325, 5 U.S.C. 504, mandates agencies to establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses to qualified parties who prevail over the government in certain adversary administrative proceedings.

The Act applies to adversary adjudicative proceedings conducted by the Commission and which are pending at any time between October 1, 1981 and September 30, 1984, regardless of when they were initiated or when final Commission action occurs. 5 U.S.C. 504, note. These are adjudications which, pursuant to 5 U.S.C. 554, are "required by statute to be determined on the record after opportunity for an agency hearing." Covered adversary adjudicative proceedings are identified in § 1025.70(c) of this rule. This rule also governs proceedings designated by Commission order as an adjudicative proceeding for purposes of the EAJA. Furthermore, if the Commission does not designate a proceeding as an adversary adjudication, that will not preclude a party who believes the proceeding is covered by the EAJA from filing an application.

In an effort to promote uniformity of procedures, the Administrative Conference of the United States ("Administrative Conference") developed draft model rules to implement the EAJA and solicited comment from all affected agencies. The Administrative Conference issued a model regulation, 46 FR 32900 (June 25, 1981), and has encouraged agencies to follow its model regulation where possible in adopting the agencies' regulations. The Commission's regulation tracks the model regulation with few exceptions.

The Commission published its proposed regulation in the **Federal Register** of November 19, 1981 (46 FR 223). Interested persons may refer to that **Federal Register** notice for a summary of the highlights of the Commission's regulation. The Commission's regulation implementing the EAJA will appear as new subpart H, section 1025.70 *et seq.*, to the Commission's Rules of Practice for Adjudicative Proceedings, 16 CFR Part 1025.

Discussion of Comments

Two persons, a toy manufacturer and the Administrative Conference of the United States, commented on the Commission's proposed regulation of November 19, 1981. The manufacturer expressed support for the Commission's proposed regulation, but suggested that the scope (Section 1025.70(a)) of the regulation be broadened so as to award fees to prevailing parties regardless of whether the Commission's position was "substantially justified." The issue of substantial justification received much Congressional attention during the debates and hearings that preceded enactment of the EAJA. The Department of Justice's *Guide on the Equal Access to Justice Act* provides a review of the legislative history concerning this issue. The Commission, however, is unable to broaden the scope of the Commission's regulation as suggested by the commenter since the EAJA (specifically 5 U.S.C. 504(a)(1)) states that an award of fees will not be made if the position of the agency is substantially justified or that special circumstances make an award unjust. Furthermore, 5 U.S.C. 504(a)(2) requires that a party seeking an award of fees and expenses affirmatively allege that the position of the agency was not substantially justified. The Commission cannot circumvent the statutory requirements of the EAJA.

According to the Judiciary Committee Reports of the United States Senate (S. Rep. No. 253, 96th Cong., 1st Sess. 6-7 (1979) and the House (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 (1980)), the standard of substantial justification represents a compromise between the dual standards under the Civil Rights Act as articulated in *Newman* v. *Piggie Park*, 390 U.S. 400 (1968) (prevailing plaintiffs should ordinarily recover their attorney fees) and *Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, at 421 (1978) (prevailing defendants should recover fees only upon a finding that a plaintiff's action was frivolous, unreasonable or without foundation). The Department of Justice, Office of Legal Policy's *Guide on the Equal Access to Justice Act* provides a thorough discussion of the issue of substantial justification and burden of proof.

Congress has characterized the standard as one of reasonableness. According to the legislative history of the Act, the language "substantially justified" was adopted from the standard in Rule 37 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 37). More specifically, Fed. R. Civ. P. 37(a)(4) provides that reasonable expenses, including attorney's fees, shall be awarded to the prevailing party on a motion for an order compelling discovery unless the court finds that the position of the losing party was "substantially justified."

According to the notes of the Advisory Committee on Civil Rules concerning the 1970 amendments to Rule 37(a)(4), an award is contemplated only where no genuine dispute exists. By

expressly adopting the Rule 37(a)(4) standard in the Act, Congress has indicated that fees should not be awarded against the governmment unless the government's position is found to be unreasonable or the government has sued or defended in a situation where no genuine dispute exists.

Based upon the aforementioned analysis of the standard of substantial justification, much of which was provided by the Department of Justice's *Guide on the Equal Access to Justice Act*, the text of the Commission's regulation at Section 1025.70(a) has not been changed as suggested by the manufacturer.

The Administrative Conference of the United States provided two comments concerning the Commission's proposed regulation. The first comment pertains to proposed § 1025.70(f)(2), the second sentence of which states that "no award to compensate an expert witness may exceed the highest rate at which the Commission is authorized to pay expert witnesses." The Administrative Conference believes that the figure representing the highest rate should be included in the text of the regulation, or the source authorizing such a figure should be cited.

The relevant provision which prescribes the highest rate at which the Commission would be authorized to pay expert witnesses is Section 408 of the HUD-Independent Agencies Appropriations Act of 1981, Pub. L. No. 96–526, 94 Stat. 3065. The Commission agrees that inclusion of an amendment stating the statutory authorization of such a payment could initially clarify potential questions. The Commission believes, however, that the clarification benefits from such an amendment are outweighed by the potential confusion and expense incurred by amending this regulation should this rate of compensation change in the future. If applicants for fees have any questions concerning recoverable expenses they can obtain assistance from the Commission staff.

The second comment made by the Administrative Conference pertains to proposed § 1025.70(h), which states that an applicant seeking an award against another agency that participates in a proceeding before the Commission should apply to that other agency for an award. The Administrative Conference believes that the Commission should determine whether such an award should be made. It points out that the Commission's presiding officer would be the person most familiar with the record of the underlying proceeding and would satisfy the definition of "adjudicative officer" in the Act. The Administrative Conference states that a conforming change should also be made to § 1025.72(g).

The Commission agrees with the Administrative Conference's comment that the person most familiar with the record of the adjudicative proceeding before the Commission is the Commission's presiding officer. However, after careful consideration of this comment and provision in general, the Commission has reconsidered its position concerning the need for proposed § 1025.70(h).

The likelihood of another federal agency participating in an adversary adjudicative proceeding subject to application of this regulation is very remote. Therefore, because this section addresses a type of proceeding the Commission believes would not be conducted, § 1025.70(h) (Awards against other agencies) as it appeared in the proposed regulation has been deleted in the final regulations.

This regulation is a subpart of the Commission's Rules of Practice for Adjudicative Proceedings. Those rules identify who may be a presiding officer in an adjudicative proceeding. 16 CFR 1025.3(i). To avoid confusion to the public and to prospective parties to an adversary adjudicative proceeding concerning who may be the presiding officer in a proceeding under the EAJA, the Commission has added a new § 1025.70(h) to the final regulation. This section states that the "presiding officer" is a person as defined in § 1025.3(i) of the Commission's Rules of Practice for Adjudicative Proceedings who conducts an adversary adjudicative proceeding.

Conclusion

The EAJA which became effective October 1, 1981, requires agencies to adopt regulations which establish uniform procedures for the award of fees and expenses in adversary adjudicative proceedings. The Commission published its proposed rule which tracks the Administrative Conference's model regulation with few exceptions and provided a 60 day comment period.

Two persons submitted comments concerning the Commission's proposed regulation. The Commission has carefully considered the comments and, with the exception of nonsubstantive editorial changes, determined to issue its final rule as set forth below.

The Administrative Procedure Act provides at 5 U.S.C. 553(d) that a substantive rule must be published at least 30 days before its effective date, unless the Commission makes a finding of good cause for an earlier effective date and includes that finding within the rule. The Commission finds for good cause that its regulation should be effective immediately upon publication.

This finding of good cause is based upon the lengthy period provided the public for comment to the Administrative Conference's model regulation, and the close similarity between the model rule and the Commission's regulation being issued here. More importantly, there are approximately eleven adversary adjudications pending before the Commission which are subject to the EAJA. If the effective date of this regulation were delayed, applicants for fees and expenses would have to rely on the less satisfactory approach of interpreting and applying under the EAJA without the guidance of Commission regulation.

List of Subjects in 16 CFR Part 1025

Administrative practice and procedure, Equal access to justice, Lawyers.

PART 1025—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

* * * * *

Accordingly, the Commission issues a new Subpart H to Part 1025 of Title 16, Chapter II of the Code of Federal Regulations, with an effective date immediately upon publication to read as follows:

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

Sec.

1025.70 General provisions.
1025.71 Information required from applicant.
1025.72 Procedures for considering applications.

Authority: Equal Access to Justice Act. Pub. L. 96–481, 94 Stat. 2325, 5 U.S.C. 504 and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

§ 1025.70 General provisions.

(a) *Purpose of this rule.* The Equal Access to Justice Act, 5 U.S.C. 504 (called "the EAJA" in this Subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to certain adversary adjudicative proceedings before the Commission. An eligible party may receive an award when it prevails over Commission complaint counsel, unless complaint counsel's position in the

proceeding was substantially justified or special circumstances make an award unjust. This Subpart describes the parties eligible for awards and the proceedings covered. The rules also explain how to apply for awards and the procedures and standards that the Commission will use to make them.

(b) *When the EAJA applies.* The EAJA applies to any adversary adjudicative proceeding pending before the Commission at any time between October 1, 1981 and September 30, 1984. This includes proceedings commenced before October 1, 1981, if final Commission action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Commission action occurs.

(c) *Proceedings covered.* (1) The EAJA and this rule apply to adversary adjudicative proceedings conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any component of the Commission is represented by an attorney or other representative who enters an appearance and participates in the proceeding. The rules in this Subpart govern adversary adjudicative proceedings relating to the provisions of sections 15 (c), (d) and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064 (c) (d) and (f); 2066(b)), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), and section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern administrative adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)). *See* 16 CFR 1025.1.

(2) The Commission may designate a proceeding not listed in paragraph (c)(1) of this section as an adversary adjudicative proceeding for purposes of the EAJA by so stating in an order initiating the proceeding or designating the matter for hearing. The Commission's failure to designate a proceeding as an adversary adjudicative proceeding shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA. Whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(3) If a proceeding includes both matters covered by the EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3) and 16 CFR 1025.3(f). The applicant must show that it meets all conditions of eligibility set out in this paragraph and in section 1025.71.

(2) The types of eligible applicants are:

(i) Individuals with a net worth of not more than $1 million;

(ii) Sole owners of unincorporated businesses who have a net worth of not more than $5 million including both personal and business interests, and not more than 500 employees;

(iii) Charitable or other tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) which have not more than 500 employees;

(iv) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and which have not more than 500 employees.

(3) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than as a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The number of employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. For this purpose, "affiliate" means (i) An individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or (ii) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest. However, the presiding officer may determine that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, the presiding officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(8) An applicant that represents himself/herself regardless of whether he is licensed to practice law may be awarded all such expenses and fees available to other prevailing eligible parties. *See* 16 CFR 1025.61 and 1025.65 of the Commission's rules.

(e) *Standards for awards.* (1) An eligible prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of Commission complaint counsel over which the applicant has prevailed was substantially justified. Complaint counsel bear the burden of proof that an award should not be made to an eligible prevailing applicant. Complaint counsel may avoid the granting of an award by showing that its position was reasonable in law and fact.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed $75 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission is authorized to pay expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the presiding officer shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(5) Fees may be awarded to eligible applicants only for service performed after the issuance of a complaint and the commencement of the adjudicative proceeding in accordance with 16 CFR 1025.11(a).

(g) *Rulemaking on maximum rates for attorney fees.* (1) If warranted by an increase in the cost of living or by special circumstances, the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this Subpart. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 533.

(2) Any person may file with the Commission a petition for rulemaking to increase the maxiumum rate for attorney fees, in accordance with the Administrative Procedure Act, 5 U.S.C. 553(e). The petition should identify the rate the petitioner believes the Commission should establish and the types of proceedings in which the rate should be used. The petition should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within a reasonable time after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

(h) *Presiding Officer.* The presiding oficer in a proceeding covered by this regulation is a person as defined in the Commission's Rules, 16 CFR 1025.3(i), who conducts an adversary adjudicative proceeding.

§ 1025.71 Information required from applicant.

(a) *Contents of application.* (1) An application for an award of fees and expenses under the EAJA shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of complaint counsel in the adjudicative proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(2) The application shall also include a verified statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if it attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section.

(3) The application shall state the amount of fees and expenses for which an award is sought.

(4) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(5) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) *Net worth exhibit; confidential treatment.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1025.70(d)(6) of this Subpart) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this Subpart. The presiding officer may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit or to public disclosure of any other information submitted, and believes there are legal grounds for withholding it from disclosure, may move to have that information kept confidential and excluded from public disclosure in accordance with § 1025.45 of the Commission rules for *in camera* materials, 16 CFR 1025.45. This motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9).

(3) Section 6(a)(2) of the Consumer Product Safety Act, 15 U.S.C. 2055(a)(2), provides that certain information which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, or subject to 5 U.S.C. 552(b)(4) shall not be disclosed. This prohibition is an Exemption 3 statute under the Freedom of Information Act, 5 U.S.C. 552(b)(3). Material submitted as part of an application for which *in camera* treatment is granted shall be available to other parties only in accordance with 16 CFR 1025.45(c) of the Commission Rules and, if applicable, section 6(a)(2) of the CPSA. If the presiding officer determines that the information should not be withheld from disclosure because it does not fall within section 6(a)(2) of the CPSA, he shall place the information in the public record but only after notifying the submitter of the information in writing of the intention to disclose such document at a date not less than 10 days after the date of receipt of notification. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission's established procedures under the Freedom of Information Act [*see* 16 CFR 1015].

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The presiding officer may require the applicant to provide vouchers, receipts;

or other substantiation for any expenses claimed.

(d) *When an application may be filed.* (1) An application may be filed whenever the applicant has prevailed in a proceeding covered by this Subpart or in a significant and discrete substantive portion of the proceeding. However, an application must be filed no later than 30 days after the Commission's final disposition of such a proceeding.

(2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(3) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(4) For purposes of this Subpart, final disposition means the later of:

(i) The date on which an initial decision by the presiding officer becomes final, *see* 16 CFR 1025.52;

(ii) The date on which the Commission issues a final decision (*See* 16 CFR 1025.55);

(iii) The date on which the Commission issues an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding (*See* 16 CFR 1025.56; or

(iv) Issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

(e) *Where an application must be filed.* The application for award and expenses must be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207 in accordance with the application requirements of this section.

§ 1025.72 Procedures for considering applications.

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as provided in the Commission's Rules of Practice, 16 CFR 1025.11–1025.19.

(b) *Answer to Application.* (1) Within 30 days after service of an application for an award of fees and expenses, complaint counsel in the underlying administrative proceeding upon which the application is based may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the presiding officer upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of Commission counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the presiding officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the Commission's standard settlement procedure (*See* 16 CFR 1115.20(b), 1118.20, 1025.26, and 1605.3). If a prevailing party and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the presiding officer may order further proceedings. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the presiding officer order further proceedings under this paragraph shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Initial Decision.* The presiding officer shall endeavor to issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the complaint counsel's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision of this Commission will only address the allocable portion for which this Commission is responsible to the eligible prevailing party.

(h) *Agency review.* (1) Either the applicant or complaint counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with 16 CFR 1025.54, 1025.55 and 1025.56.

(2) If neither the applicant nor Commission complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued.

(3) If an appeal from or review of an initial decision under this Subpart is taken, the Commission shall endeavor to issue a decision on the application within 90 days after the filing of all briefs or after receipt of transcripts of the oral argument, whichever is later, or remand the application to the presiding officer for further proceedings.

(i) *Judicial Review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall

submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a verified statement that the applicant will not seek review of the decision in the United States courts. (Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207.) The Commission will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding. Comments and accompanying material may be seen in or copies obtained from the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, during working hours Monday through Friday.

Dated: June 4, 1982.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 82-16015 Filed 6-11-82; 8:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[T.D. ATF-107; Ref: Notice No. 386]

Chalone Viticultural Area

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Treasury.

ACTION: Final rule, Treasury decision.

SUMMARY: This final rule establishes a viticultural area located in Monterey and San Benito Counties, California, to be known as "Chalone." The name for this viticultural area was initially proposed as "The Pinnacles", in Notice No. 338 (45 FR 17027). However, based on comments received and testimony given at a public hearing on May 2, 1980, the Bureau of Alcohol, Tobacco and Firearms (ATF) concluded that the proposed name would be inappropriate if used to designate the proposed viticultural area. ATF, in Notice No. 386 (46 FR 49600), reopened the comment period for submission of alternative names in lieu of "The Pinnacles." The petitioner, Gavilan Vineyards, Inc., through its Chairman of the Board, Mr. Richard H. Graff, submitted the name "Chalone" as an alternative name, which was supported by another comment. ATF believes the establishment of Chalone as a viticultural area and its subsequent use as an appellation of origin in wine labeling and advertising will allow the petitioner and other wineries which may produce wine from grapes grown in the area to better designate their specific grape-growing area and will enable consumers to better identify the wines they purchase.

EFFECTIVE DATE: July 14, 1982.

FOR FURTHER INFORMATION CONTACT: Norman P. Blake, Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226 (202-566-7626).

SUPPLEMENTARY INFORMATION:

Background

On August 23, 1978, ATF published Treasury Decision ATF-53 (43 FR 37672, 54624) revising regulations in 27 CFR Part 4. These regulations allow the establishment of definite viticultural areas. These regulations also allow the name of the approved viticultural area to be used as an appellation of origin in wine labeling and advertising.

On October 2, 1979, ATF published Treasury Decision ATF-60 (44 FR 56692) which added a new Part 9 to 27 CFR for the listing of approved viticultural areas. Section 9.11, Title 27 CFR, defines an American viticultural area as a delimited grape-growing region distinguishable by geographic features.

Section 4.25a(e)(2), Title 27 CFR, outlines the procedures for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area.

ATF was petitioned by the Gavilan Vineyards, Inc. (d.b.a. Chalone Vineyard) to establish a viticultural area in Monterey and San Benito Counties, California, to be named "The Pinnacles." In response to this petition, ATF published a Notice of Proposed Rulemaking and Notice of Hearing, No. 338, in the **Federal Register** on March 17, 1980 (45 FR 17027).

A public hearing concerning the proposal was held in Salinas, California, on May 2, 1980, and written comments were accepted until May 16, 1980. Five persons testified at the hearing and two written comments were submitted.

Based upon testimony presented at the public hearing and written comments submitted, ATF concluded that the proposed name, "The Pinnacles", was inappropriate to designate the proposed viticultural area. This determination was arrived at because of trademark claims by another winery and the possibility of consumer confusion that would result if the proposed name were approved. Therefore, ATF issued another Notice of Proposed Rulemaking, No. 386, in the **Federal Register** on October 7, 1981 (46 FR 49600), reopening the comment period to solicit comments for alternative names. In particular, ATF requested comments concerning the names "Chalone", "Gavilan" or derivations of those names.

Comments for New Proposed Name

In response to the notice for alternative names, ATF received four comments. The comments were submitted by: the petitioner; Paragon Vineyard, a California winery not located in the vicinity of the proposed area; a law firm representing Foreign Vintages, Inc., an importer of distilled spirits; and a professor from the University of Illinois, College of Medicine.

The petitioner stated that the most satifactory and proper designation for the viticultural area would be "the simple and unadorned word 'Chalone'." The petitioner further stated the name is associated with two of the most distinctive geographical features surrounding the proposed area, North and South Chalone Peaks. Paragon Vineyard also supported the name "Chalone" as being the most appropriate name while discounting the use of "Gavilan" as referring to numerous geographical features within California. The law firm representing the importer of distilled spirits objected to the use of "Gavilan" on the basis that their client has established common law and statutory rights as owner of the trademark "Gavilan" for tequila. The university professor commented that the proposed area was too restrictive to qualify for the designation Gavilan (or Gabilan) Mountains.

Evidence Relating to the Name "Chalone"

Paragon Vineyard submitted historical evidence which establishes the history of the name Chalone, dating back to 1816 at which time the name referred to a division of the Costanoan family which lived in the area. Further evidence was submitted which claimed that the Pinnacles Monument was initially called Chalone Peaks prior to being designated as a national monument. Within the area covered by the Pinnacles National Monument, the two most distinctive geographical features, according to the petitioner, are the North and South Chalone Peaks. The western boundary of the national monument is the eastern boundary of the viticultural area. One of the U.S.G.S. maps submitted with the petition is entitled "North Chalone Peak." Chalone

Creek encircles the viticultural area on two sides, the north and east.

The viticultural area contains one winery, Chalone Vineyard, and 120 acres of vines. The petitioner stated that approximately 50 percent of the proposed area is plantable; however, due to the shortage of water for irrigation, the majority of the area is not being cultivated.

ATF believes that sufficient evidence has been submitted which establishes the historical and current use of the name Chalone as applying to the proposed viticultural area.

Boundaries

The petitioner initially proposed boundaries which included 5760 acres of land which "has historically been farmed on the [geological] bench, as well as essentially all reasonably capable of being farmed." During the public hearing, the petitioner proposed an amendment to the boundaries of an additional 2880 acres which were omitted from the original petition through an oversight on his part and which he claims properly belong in the viticultural area. The petitioner further stated that it was initially his intention to avoid including too much unplantable land. Subsequently the boundaries were amended to include "more area that was not plantable in order to avoid omitting anything." The proposal to amend the boundaries did not receive any objections at the public hearing or in post-hearing comments submitted.

The viticultural area, as amended, consists of 8640 acres of rolling land located on a geological bench in the Gabilan (or Gavilan) Mountain Range of Central California. The area has a mean elevation of 1650 feet above sea level and drains into Bryant Canyon, Stonewell Canyon and Shirttail Gulch. The boundaries are as follows: to the south and west, the points at which the land drops off sharply to the Salinas Valley; to the north, the ridge line (watershed divide) effectively dividing Monterey and San Benito Counties, and the Gloria Valley on the other side; and, to the east, the western boundary of the Pinnacles National Monument.

Based on the evidence submitted and testimony given at the public hearing, ATF has determined that the amended boundaries sufficiently distinguish the viticultural area from surrounding areas and, therefore, the amended boundaries are being adopted. While the boundaries do not precisely coincide with geographical outlines of the area, the use of section lines to describe the boundaries is acceptable in this instance since the section lines closely approximate natural boundaries.

The exact boundaries of the viticultural area and the appropriate U.S.G.S. maps used to determine the boundaries are listed in the final regulation of this document.

Geophysical Evidence

In accordance with 27 CFR 4.25a(e)(2), a viticultural area should possess geographical features which distinguish its viticultural features from surrounding areas. ATF has determined on the basis of the testimony presented at the public hearing and the written comments received that the proposed area is distinguished from the surrounding area in elevation, climate and soil.

The proposed area ranges in elevation from 1400 to 2000 feet above sea level, with a mean elevation of 1650 feet above sea level. The surrounding area to the south and west is characterized by a steep drop to the Salinas Valley, which has a mean elevation of 300 feet above sea level. The area to the east, the Pinnacles National Monument, is unavailable for private agriculture. Except for the Gloria Valley (which is distinguishable from the viticultural area for other reasons), the area to the north rises to higher elevations than those found in the viticultural area.

The petitioner claims that the differences in elevation between the Salinas Valley and the proposed area produce dramatic differences in climatic conditions. The climate of the Salinas Valley is tempered by the cooling winds from Monterey Bay which form a thick fog layer that extends to an elevation of 1000 feet. In summer the viticultural area is approximately 10 degrees warmer than the Salinas Valley because the former does not receive the cooling winds and fog cover from Monterey Bay.

The soils of the proposed area significantly differ from soils of surrounding areas. Within the proposed area, the soils primarily consist of Miocene volcanic and Mesozoic granitic rocks, heavy in limestone deposits. The Salinas Valley to the south and west consists of alluvium and river terrace rocks, while the Gloria Valley to the north is alluvial. The Pinnacles National Monument, to the east, though similar in mineral deposits, is unavailable for private agriculture.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) do not apply to this final rule because it will not have a significant economic impact on a substantial number of small entities. This final rule will not have any other significant effect on a substantial number of small entities, or cause a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities. Available information indicates that this final rule affects only one small entity.

Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this final rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12291

It has been determined that this final regulation is not a "major rule" within the meaning of Executive Order 12291 of February 17, 1981, because it will not have an annual effect on the economy of $100 million or more; it will not result in a major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Miscellaneous

ATF is approving this area as being viticulturally distinct from surrounding areas. By approving the area, ATF is permitting wine producers to claim a distinction on labels and advertisements as to the origin of the grapes. Any commercial advantage gained can only be substantiated by consumer acceptance of Chalone wines.

Drafting Information

The principal author of this document is Norman P. Blake, Specialist, Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedure, Consumer protection, Viticultural areas, and Wine.

Authority

PART 9—AMERICAN VITICULTURAL AREAS

Accordingly, under the authority contained in section 5 of the Federal Alcohol Administration Act (49 Stat. 981, as amended; 27 U.S.C. 205), 27 CFR Part 9 is amended as follows:

Par. 1. The table of sections in 27 CFR Part 9, Subpart C, is amended to add the title of § 9.24. As amended, the table of sections reads as follows:

Subpart C—Approved American Viticultural Areas

Sec.

* * * * *

9.24 Chalone.

Par. 2. Subpart C is amended by adding § 9.24 to read as follows:

Subpart C—Approved American Viticultural Areas

* * * * *

§ 9.24 Chalone.

(a) *Name* The name of the viticultural area described in this section is "Chalone."

(b) *Approved maps.* The appropriate maps for determining the boundaries of the Chalone viticultural area are four U.S.G.S. 7.5 minute quadrangle maps. They are titled:

(1) "Mount Johnson, California, 1968";

(2) "Bickmore Canyon, California, 1968";

(3) "Soledad, California, 1955"; and

(4) "North Chalone Peak, California, 1969."

(c) *Boundaries.* The Chalone viticultural area includes 8640 acres, primarily located in Monterey County, California, with small portions in the north and east located in San Benito County, California. The boundaries of the Chalone viticultural area encompass:

(1) Sections 35 and 36, in their entirety, of T.16 S., R.6.E.;

(2) Sections 1, 2 and 12, in their entirety, of T.17 S., R.6 E.;

(3) Sections 6, 7, 8, 9, 16, and 17, in their entirety, the western half of Section 5, and the eastern half of Section 18 of T.17 S., R.7 E.; and

(4) Section 31, in its entirety, and the western half of Section 32 of T.16 S., R.7 E.

Signed: May 17, 1982.

Stephen E. Higgins,

Acting Director.

Approved: June 2, 1982.

John M. Walker, Jr.,

Assistant Secretary, (Enforcement and Operations).

[FR Doc. 82-16021 Filed 6-11-82; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 1

[CGD 81-063]

Delegation of Authority Under the Regulatory Flexibility Act; Correction

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This document corrects the paragraph designation of a delegation of authority with respect to Regulatory Flexibility Act certifications, published at 46 FR 42268, Aug. 20, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. William Register, Office of the Chief Counsel, Coast Guard Headquarters G-LRA; (202) 426-1534.

SUPPLEMENTARY INFORMATION:

PART 1—GENERAL PROVISIONS

The Delegation of Authority published on August 20, 1981 (46 FR 42268) incorrectly placed the delegation within 33 CFR Part 1. The delegation should have been placed at 33 CFR § 1.05.-1(k), rather than at paragraph (i) as published.

Accordingly, the Delegation is corrected to read:

§ 1.05-1 General.

* * * * *

(k) The Commandant redelegates to each Coast Guard District Commander and Captain of the Port the authority to make the certification in section 605(b) of the Regulatory Flexibility Act (Sec. 605(b), Pub. L. 96-354, 94 Stat. 1168 (5 U.S.C. 605)) for rules that they issue.

E. H. Daniels,

Chief Counsel.

[FR Doc. 82-15936 Filed 6-11-82; 8:45 am]

BILLING CODE 4910-14-M

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33 CFR Part 127

[CGD 13-82-03]

Security Zone—Strait of Juan de Fuca and Hood Canal, Washington

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This amendment to the Coast Guard's Security Zone Regulations establishes two Security Zones within the waters of Northwestern Washington during the port call of the USS *Ohio* (SSBN 726). These security zones are established to safeguard the USS *Ohio* while she transits to and from the U.S. Naval Submarine Base, Bangor, Washington through the Strait of Juan De Fuca and the Hood Canal and while moored at her homeport in the Hood Canal. The effect of this Rule will be to close portions of the Strait of Juan De Fuca and Hood Canal from use by general maritime traffic while the USS *Ohio* is within the waters of Northwestern Washington.

DATES: This amendment is effective on August 1, 1982 or when the USS *Ohio* enters the waters of Northwestern Washington whichever occurs last and will remain in effect until the vessel's departure from the navigable waters of the United States but in no case will its provisions extend beyond December 31, 1982.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Timothy G. M. Balunis, c/o Captain of the Port, 1519 Alaskan Way S., Seattle, Washington 98134; Tel: (206) 442-1853.

SUPPLEMENTARY INFORMATION:

Discussion

During August of 1982, the USS *Ohio* (SSBN 726) will arrive within the waters of Northwestern Washington to commence its assigned duties in the national defense operating out of its homeport the United States Naval Submarine Base at Bangor, Washington. Considerable public attention has been focused on this vessel's arrival as the first defense resource of its kind in this area. There have been numerous reports of activities planned to disrupt the vessel's ability to perform her mission by delaying her arrival and departure from the U.S. Naval Submarine Base. Similarly, the U.S. Naval Submarine Base itself will reportedly be the focus of much public protest concerning the USS *Ohio's* mission capabilities during the period of time that the vessel is in port. The United States Navy has requested the implementation of these security areas. The security zones will be enforced by representatives of the Captain of the Port, Seattle, Washington. The Captain of the Port will be assisted in enforcing these security zones by local law enforcement authorities.

Prohibited Acts

As provided in the General Security Zone Regulations (333 CFR 127.15) no person or vessel may enter a security zone unless authorized by the Captain of the Port.

Penalties

Violation of this security zone will result in prosecution under the authority of 50 U.S.C. 191, which provides for the seizure and forfeiture of vessels and imprisonment for up to 10 years and a fine of up to $10,000.

Rule-making procedures have not been followed in accordance with 5 U.S.C. 553 since this action involves a military affairs function of the United States.

Drafting Information

The principal persons involved in the drafting of the rulemaking are LCDR Timothy G. M. Balunis, Project Officer.